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Supreme Court of the United States

OCTOBER TERM, 1944

No. 729

AETNA INSURANCE COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, THE AUTOMOBILE INSURANCE COMPANY OF HARTFORD, THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LTD., COMMERCIAL UNION ASSURANCE COMPANY, LIMITED, THE CONNECTICUT FIRE INSURANCE COMPANY, THE CONTINENTAL INSURANCE COMPANY, FEDERAL INSURANCE COMPANY, HARTFORD FIRE INSURANCE COMPANY, THE HOME INSURANCE COMPANY, INSURANCE COMPANY OF NORTH AMERICA, NORTH BRITISH & MERCANTILE INSURANCE COMPANY, LIMITED, ROYAL INSURANCE COMPANY, LIMITED, STANDARD MARINE INSURANCE COMPANY, LIMITED, UNIVERSAL INSURANCE COMPANY and WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiffs-Petitioners,

against

HENRY DUBOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

RAY ROOD ALLEN,
Attorney for Petitioners.

(BURLINGHAM, VEEDER, CLARK & HUPPER)

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Plaintiffs-Petitioners,

against

HENRY DUBOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of *certiorari* issue to review the final decision of the United States Circuit Court of Appeals for the Second Circuit filed August 24, 1944, affirming a final judgment entered in the United States

District Court for the Southern District of New York on December 3, 1943, in favor of the defendants and against the plaintiffs (R. 27-9).

The Circuit Court of Appeals opinion (R. 35-43) is reported at 144 F. (2nd) 262. The District Court opinion (R. 20-7) is reported at 53 F. Supp. 516.

Jurisdiction

Jurisdiction is based on Section 240 (a) of the Judicial Code, as amended, 28 United States Code 347.

The mandate of the Circuit Court of Appeals was entered September 14, 1944 (R. 44).

Summary Statement

Aetna Insurance Company and the other petitioners were insurers of tug *Ariosa*. Respondent Hartford Fire Insurance Company was the insurer of the scow *D. 22*. Respondent DuBois was the owner and operator of both the tug and the scow (R. 3-4).

Through the tug's negligence the scow was caused to collide with the steamship *Segundo*, owned by a third party, and the scow, as well as the *Segundo* (which was also at fault), sustained damage (R. 5).

The tug underwriters did not question their obligation to satisfy DuBois' liability to the *Segundo's* owner, but the two sets of underwriters disagreed as to how DuBois' scow damage should be borne. This was because of the common ownership of the tug and the scow—in such case there could be no tort liability of DuBois as owner of the tug to DuBois as owner of the scow. However, in order that DuBois should not be out of pocket, the two sets of

underwriters, between them and without prejudice, reimbursed DuBois for his complete loss (including his liability to the *Segundo*) (R. 6-7), and the controversy was then submitted to the Court for determination on a declaratory-judgment complaint, all the allegations of which were admitted by defendants' answer (R. 17).

The Insurance and What the Underwriters Did

The tug policy was for $45,000 (Schedule B to the complaint).

The scow policy was for $10,000 (Schedule C to the complaint): this only partially insured the scow, for the scow's damages amounted to $18,524 (R. 5).

The policies covered legal liability resulting from collision, as well as physical damage.

As regards DuBois' liability to the *Segundo*, the tug underwriters paid $2,122.67 to enable DuBois to satisfy the final decree obtained against him by the *Segundo* for that amount (R. 6).

As regards the damage to the scow, the scow underwriter paid DuBois the full amount of the scow policy under a loan receipt (R. 4, 12), and the tug underwriters paid DuBois the balance of his loss, under the so-called "sister-ship" clause of the tug policy—quoted later. The payments thus made were $9,900 ($10,000, less a $100 policy deductible) by the scow underwriter (R. 4), and $9,765.78, plus the previously mentioned $2,122.67, by the tug underwriters (R. 6-7). With adjustments for interest and deductible average, which are not questioned, these payments aggregated DuBois' total loss and claim (R. 7).

It was contended, however, that the tug underwriters should pay an additional $11,483.36 (R. 7, 8). This sum represented the $9,900 paid to DuBois by the scow under-

writer, plus interest thereon from the time of payment (R. 7 at f. 20; R. 8 at f. 24).

Although DuBois is a nominal party, he has no financial interest at stake, since under the terms of the loan receipt, the so-called loan is repayable "only out of any net recovery", and any recovery would belong wholly to Hartford, the scow underwriter, who has full control over the proceedings (R. 12). It is conceded that in so far as the claim is put forward in the name of DuBois, it is put forward in the sole interest of Hartford (R. 8 at f. 24).

Since the insurers of a tug would ordinarily be liable only for damage to the tug [there was none here] and not for damage to another vessel belonging to the tug owner, the controversy turned on the effect to be given to the sister-ship clause in the tug policy. The collision clause and the sister-ship clause of the tug policy read as follows:

> "AND IT IS FURTHER AGREED that if the vessel hereby insured shall come into collision with any other vessel, craft or structure, floating or otherwise (including her tow); or shall strand her tow or shall cause her tow to come into collision with any other vessel, craft, or structure, floating or otherwise, and the Assured, as owner of the vessel, shall in consequence thereof become liable to pay and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such casualty the value of the vessel hereby insured, we, the Underwriters, will pay the Assured such proportion of such sum or sums so paid as our subscriptions hereto bear to the value of the vessel hereby insured. And in cases where the liability of the vessel has been contested, with the consent in writing, of a majority of the Underwriters on the hull and machinery (in amount), we will also pay a like proportion of the costs and expenses thereby incurred or paid; but when both vessels are to blame, then unless the liability of

the owners of one or both of such vessels becomes limited by law, claims under the collision clause shall be settled on the principle of CROSS LIABILITIES, as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured in consequence of such casualty. * It is hereby further agreed that the principles involved in this clause shall apply to the case where two or more of the vessels involved are the property in part or in whole of the same owners, all questions of responsibility and amount of liability as between such ships or vessels being left to the decision of a single arbitrator, if the parties can agree upon a single arbitrator, or failing such agreement, to the decision of arbitrators, one to be appointed by the managing owners of such vessels, and one to be appointed by the majority in amount of Underwriters interested in each vessel; the two arbitrators chosen to choose a third arbitrator before entering upon the reference, and the decision of such single or of any two of such three arbitrators, appointed as above, to be final and binding: provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, or for loss of life or personal injury."

What the Circuit Court of Appeals Decided—Decisions Contra

The Circuit Court of Appeals held that in addition to the amounts paid by the tug underwriters as above stated, they must also pay the $9,900 (plus the interest thereon), paid by the scow underwriter. Thus, the entire loss was placed on the tug underwriters and the scow underwriter went free.

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* The sister-ship clause begins here.

The decision is squarely contrary to the ruling made in the Fourth Circuit some twenty years ago in a similar situation arising out of the *Augusta-Detroit* collision. The *Augusta* and the *Detroit* were of common ownership. Judge Harrington Putnam, as Arbitrator, held that the underwriters on the innocent barge *Detroit* could not invoke subrogation as against the negligent sister ship, the steamer *Augusta*, or her underwriters, or have the benefit of the sister-ship clause in the *Augusta* policies; that the steamer's underwriters were liable under the sister-ship clause only to the extent that the barge was not otherwise insured. That result was approved by the District Court of Maryland and by the Circuit Court of Appeals, Fourth Circuit. *The Augusta-Detroit* arbitration, 1930 A. M. C. 1035, 1037 [decided in 1923]; *McLanahan* v. *Marine Ins. Co.*, 1924 A. M. C. 872 (District of Maryland—not officially reported), aff'd 5 F. (2d) 773 (Fourth Circuit).

In the present case, the Second Circuit recognized that Hartford's hull insurance covered the scow. Since the Court held that the sister-ship clause of the tug policy covered DuBois' entire loss, then (if the Court was right) there were two insurances to which DuBois could look. In such a situation the loss should be borne by the two sets of underwriters in proportion to their respective commitments, as this Court held in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. The Second Circuit refused, however, to apply that rule.

Questions Presented

Does the sister-ship clause in a policy on a vessel found to be at fault cover the entire damages sustained by a sister ship of that vessel, or only the uninsured part of such damages? Are the underwriters who insure a barge, entitled to the benefit of a sister-ship clause in a policy insuring a tug belonging to the same owner?

If the sister-ship clause coverage is not limited to the uninsured damages to the assured's other vessel, does the entire loss in respect to such other vessel fall on the sister-ship clause underwriters or should the loss be borne by the two sets of underwriters in proportion to their respective commitments?

Reasons for Granting the Writ

1. The decision of the Second Circuit is in conflict with the rule enunciated by the Fourth Circuit in *The Augusta-Detroit* case, *Marine Insurance Co.* v. *McLanahan*, 5 F. (2d) 773.

2. If it be assumed that the Second Circuit was right in holding that the sister-ship clause coverage was not limited to the uninsured damages sustained by the assured's other vessel, then the decision is in conflict with this Court's decision in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

WHEREFORE, petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Second Circuit commanding that Court to certify and to send to this Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets No. 402, October Term, 1943, *Aetna Insurance Company, et al., Appellants, against Henry DuBois Sons Company and Hartford Fire Insurance Company, Appellees,* and that the decision of the said Circuit Court of Appeals in said case be reversed and that your petitioners have such other and further relief in the premises as may be just.

AETNA INSURANCE COMPANY, et al.,
Petitioners,
By RAY ROOD ALLEN,
Attorney.

New York, December 1, 1944.

Supreme Court of the United States

OCTOBER TERM, 1944

No.

ÆTNA INSURANCE COMPANY, et al.,
Plaintiffs-Petitioners,

against

HENRY DE BOS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,
Defendants-Respondents.

BRIEF IN SUPPORT OF PETITION

FIRST POINT

The decision below is in conflict with the *Augusta-Detroit* decision in the Fourth Circuit (5 F. 2nd 773).

The fact situation in the *Augusta-Detroit* case was almost identical with that in the present case. Through her sole negligence, the steamer *Augusta* sank her sister-ship, the barge *Detroit*, and damaged the *Capitaine de Beauchamp*, owned by a third party. Thus the two cases differed only in the immaterial respect that the outside vessel, the *Beauchamp*, was free from fault, whereas in the present case, the *Segundo* was partly at fault.

As in the present case, the barge was not fully insured by the barge policies and the amount the barge under-

writers paid ($25,932) covered only part of the barge loss ($100,000). The barge owner and her underwriters then claimed for the entire barge loss under the sister-ship clause of the steamer's policies. The Arbitrator allowed only the uninsured residue of the barge loss ($74,068)—comparable to the amount paid here under the tug's sister-ship clause.

The Arbitrator held that the rights under the *Augusta's* sister-ship clause related to a subject-matter—the steamer—wholly different from the subject-matter of the barge insurance and were personal to the *Augusta's* owners; that neither the underwriters on the barge, nor the barge owner in their interest, could invoke any rights under the sister-ship clause of the steamer policies; that the sister-ship underwriters were liable only for that part of the barge loss which was not covered by the barge insurance, 1930 A. M. C. 1035, 1037.

The Fourth Circuit agreed with this view, quoting at length from the Arbitrator's decision "because of the manifest strength and apparent justice of the same" (5 F. (2d) 773, 776). It found the reasoning of the Arbitrator "entirely conclusive" as to the effect of the sister-ship clause (p. 776), and it said "we fully concur" with the District Court (which had also agreed with the Arbitrator) that "the awards as made were right" (p. 777).

The result reached by the Fourth Circuit logically flows as a legal consequence of the common ownership. The owner of the vessel at fault could not be liable to himself as owner of the innocent vessel. *Simpson & Co.* v. *Thomson*, L. R. 3 A. C. 279, 288. It makes no difference that any recovery that the owner might make (if he could sue himself) would be for the benefit of his underwriters. *Globe*

& Rutgers Fire Insurance Co. v. *Hines*, 273 Fed. 774, cert. den. 257 U. S. 643:

> "There can be no right of subrogation, if the ship which is insured and the ship which commits the injury are owned by the same party" (p. 777).

Because of the common ownership, therefore, Hartford, as insurer of DuBois' scow, could have no subrogation rights against Dubois, as owner of the tug, or against those who insured Dubois against liability on the part of the tug.

The Second Circuit attached importance to the fact that DuBois' scow was not at fault (R. 40). That would be of importance if the scow owner could sue the tug owner, but the common ownership prevented such suit. The scow's innocence or fault has no bearing on the scow underwriter's liability to reimburse DuBois for his scow damages, and, in view of the common ownership, no bearing on the question of subrogation.

The history of the sister-ship clause (quoted, pp. 4-5) makes clear that its purpose was not to afford an overlapping insurance, but to indemnify the owner of the vessel insured by the sister-ship clause, where not otherwise protected. The origin of the clause lay in the desire to protect the common owner in respect of detention losses. Detention is not covered by hull policies and, although both vessels might be insured under collision clauses, common ownership would prevent the owner getting detention reimbursement under the collision clause—he could not be liable, as owner of the vessel at fault, to himself, as owner of the blameless vessel. The *Augusta-Detroit*, 1923 A. M. C., at p. 819; II Arnould on Marine Insurance (12 Ed.), Section 795, note (r) at p. 1056.

Instead of applying the "principles" of the collision clause in the interest of the common owner by affording him needed protection, the Second Circuit has construed the sister-ship clause as, in effect, requiring a disregard of the common ownership, even as between the tug underwriters and a stranger, the scow underwriter. This would lead to results inequitable to the assured, as an illustration will show.

If the tug underwriters' liability were determined as though there were no common ownership, almost nothing would be recoverable under the sister-ship clause if the tug were lost in the collision, for the tug's liability would be practically nil, because of the limitation of liability statute (46 U. S. Code, Sec. 183, makes the limit of liability in the absence of privity, the value of the vessel *after* the disaster, plus any pending freight). In *The Augusta-Detroit*, however, the sister-ship clause underwriters were required to pay on the basis of *Detroit's* entire uninsured damages, notwithstanding the *Augusta's* limitation value was less.*

The Second Circuit in nowise questioned the soundness of the *Augusta-Detroit* decision. Indeed, it cited it as in accord with its own decision, saying that the Fourth Circuit had held:

> "that the insurer of a towing vessel [the *Augusta*] at fault for collision damages to a vessel under common ownership could not, in the absence of policy provi-

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* Notwithstanding the *Augusta's* limitation value was about $67,000 in which the *Beauchamp* was entitled to share, the *Augusta's* sister-ship clause underwriters were required to pay the *Detroit's* owner on the basis of *Detroit's* uninsured damages of $74,068. The amount actually paid was somewhat less than this, because the *Augusta* was under-insured by about 6½%, making the actual payments under the sister-ship clause $69,252.59—and thus much in excess of what the *Detroit* could have recovered from the *Augusta* had there been no common ownership. 1930 A. M. C., at pp. 1036-8.

> sions to that effect, diminish its liability under collision and sister ship clauses for that loss by the amount of hull insurance paid on a policy on the vessel damaged [the *Detroit*]" (R. 43).

Actually, however, the liability of the *Augusta's* underwriters was diminished by the amount of the hull insurance paid on the *Detroit*: the *Augusta* underwriters were held liable not for the entire loss on the *Detroit*, but only for $74,068, the difference between the entire loss ($100,000) and the amount covered by the *Detroit's* policies ($25,932). The Second Circuit recognized that such was the fact, when it said that *The Augusta-Detroit* had determined that:

> "such [*Augusta's*] underwriters were bound under the sister ship clause to pay for the loss of the *Detroit* to the extent that the owner had not been compensated for it out of the proceeds of the *Detroit* policy" (R. 42).

In its attempt to resolve the inconsistency between the two foregoing statements, the Court fell into confusion when it stated:

> "Though the underwriters had in effect thus been given credit in fixing their liability under the *Augusta* policy for what *they* [italics supplied] had already paid on the *Detroit* policy * * *" (R. 42),

for it was not the *Augusta's* underwriters who had paid on the *Detroit* policy, but the *Detroit's* underwriters.

Although the *Detroit's* underwriters were also on the *Augusta* policies, they comprised only about one-sixth in amount of the *Augusta's* underwriters, as the record in the Fourth Circuit shows (Transcript of Record, pp. 51-2). The Fourth Circuit decision did not, and could not, turn upon the ground that the two sets of underwriters were the same.

As to the Loan Receipt

The Second Circuit said it was unnecessary for it to decide whether the scow underwriter could claim subrogation as against the tug underwriters, for (said the Court):

> " * * * the defendants have in the loan receipt given effect to the equivalent of a right of subrogation * * * " (R. 41).

Subrogation is a legal right arising by operation of law. *The Augusta-Detroit* held that no subrogation rights arose as against the sister-ship clause underwriters. How the loan receipt, evidencing a transaction to which the tug underwriters were not parties, could create a right of subrogation where none existed, or could give "effect to the equivalent of a right of subrogation"—when no such right existed, the Court made no attempt to explain.

Loan receipts have been recognized as a method of protecting underwriters' subrogation rights, but never of enlarging them. A loan receipt is appropriate where an underwriter's liability is *contingent* only and it is desired to put the assured in funds yet not have the advance construed as a payment. But where the underwriter's obligation is unconditional, as was the scow underwriter's obligation here, the loan receipt accomplished nothing. In *Luckenbach* v. *McCahan Sugar Refining Co.*, 248 U. S. 139, cited by the Second Circuit (R. 39), the underwriter was only *conditionally* liable—the policy coverage was conditioned on non-liability of the carrier, and the underwriter could properly stipulate that his advance should not be considered a payment. That distinction was recognized in *China Fire Insurance Co.* v. *Davis*, 50 F. (2d) 389, cert. den. 284 U. S. 658, where the Court said:

"In that case the defendant must succeed, because, although the plaintiff used a form of receipt, which made the payment a loan to the shipper, there was, as we have said, no provision in the policies, as in Luckenbach v. W. J. McCahan Sugar Co., 248 U. S. 139, 39 S. Ct. 53, 63 L. Ed. 170, 1 A. L. R. 1522, by which the underwriter became liable only to the extent that the carrier was not" (p. 391).

SECOND POINT

The decision below is in conflict with this Court's decision in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

There was no dispute that the scow policy covered the damage to the scow and that under that policy DuBois could recover his scow damage from the scow underwriter up to the policy limit. There was nothing in the scow policy that freed the scow underwriter from liability to the scow owner in case of other insurance that might cover the loss.

If the Circuit Court of Appeals was correct in rejecting our first contention and holding that the tug's sister-ship clause covered all the damage to the scow and not merely the uninsured scow damage, then DuBois had two insurances to which he might look to cover his loss.

In such case, the law does not leave the matter to the whim of the assured to decide upon which of the two sets of underwriters he will put the loss. The rule is that the loss must be borne by the two sets of underwriters in proportion to their respective commitments. *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527. The test for applying this rule, as the *Home Insurance Co.* case shows, is not whether the coverage of the two different policies is the same, but whether, under the circumstances

of the particular case, the loss falls within the coverage of both policies. This rule for apportionment of the loss cannot be avoided by the device of the loan receipt. *Dixey* v. *Federal Compress & Warehouse Co.*, 140 F. (2d) 820, 821; *Davis Yarn Co.* v. *Brooklyn Yarn Dye Co.*, 293 N. Y. 236, 242.

The apportionment rule was applied by the arbitrator in *The Industry-Commerce Arbitration*, 1939 A. M. C. 717, in a situation similar to the present. The arbitrator divided the loss between the sister-ship clause underwriters who insured the vessel at fault, and the underwriters on the innocent vessel belonging to the same owner.

Whatever the situation might be in a suit by DuBois in his own interest against the tug underwriters, beneficially this controversy is solely between the two sets of underwriters and all the parties in interest are parties to the present suit. The apportionment rule can therefore be applied in this suit.

CONCLUSION

Because of the above conflict in the decisions, involving a novel question of marine insurance law of general importance, a writ of *certiorari* should be granted in order that the questions involved may be finally determined.

New York, N. Y., December, 1944.

Respectfully submitted,

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(BURLINGHAM, VEEDER, CLARK & HUPPER)

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PETITION FOR CERTIORARI.
BRIEF OF RESPONDENTS IN OPPOSITION TO

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CORPORATE PRESS, INC., NEW YORK CITY

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Plaintiffs-Petitioners,

against

HENRY DU BOIS SONS COMPANY and HARTFORD FIRE INSURANCE COMPANY,

Defendants-Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

The petitioner invokes the jurisdiction of this Court under Sec. 240(a) of the Judicial Code as amended, 28

U. S. C. 347; claiming that the decision of the Circuit Court of Appeals herein (R. 35-43), reported at 144 F. (2d) 262, is in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *McLanahan* v. *Marine Insurance Co.*, 5 F. (2d) 773. As a secondary contention, the petitioner urges that if its primary contention is not upheld, in such event the Circuit Court erred in failing to apply the doctrine of double insurance as announced by this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

Respondents contend that the decision of the Circuit Court of Appeals for the Second Circuit in the instant case, not only is not in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in *McLanahan* v. *Marine Insurance Co.*, but as shown by the analysis of the *McLanahan* case in the opinion below (R. 42-43), is entirely consonant with that opinion. With respect to the secondary contention advanced by petitioner, it appears from the opinion of the Circuit Court in the instant case that the Circuit Court gave due recognition to the decision of this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, but appropriately held that "there is no double insurance and there can be no double recovery at all (R. 40)."

Facts.

On March 28, 1938, plaintiffs issued to defendant, Henry Du Bois Sons Company, a policy of insurance upon the tug *Ariosa* in the amount of $45,000. On August 26, 1938, the defendant Hartford Fire Insurance Company, issued a policy to the defendant Du Bois on the scow *D 22* in the amount of $10,000. On December 7, 1938, the scow D *22* while in tow of the tug *Ariosa* was in collision with the motor vessel *Segundo*, as a result of which the *Segundo* and the scow *D 22* both sustained damage (R. 4). On March

20, 1939, Du Bois instituted action against the *Segundo* in the United States District Court for the Eastern District of New York, and in the litigation which ensued both the *Segundo* and the tug *Ariosa* were held mutually at fault, resulting in a balance of damages in favor of the owners of the *Ariosa* against respondent, Du Bois, in the sum of $2,122.67 (R. 5).

On April 19, 1939, after the commencement of the aforesaid litigation the respondent, Hartford Fire Insurance Company, advanced to the respondent, Du Bois, under a loan receipt in customary form, the sum of $9,900 which was equivalent to the amount of its insurance on the *D 22* (R. 4, at f. 12). The loan receipt is set forth in full as Schedule D annexed to the complaint (R. 12). The damage sustained by the *D 22* as ultimately fixed in the litigation between Du Bois and the owners of the *Segundo* was $18,524 (R. 5, at f. 15).

The insurance policy written by the plaintiffs upon the tug *Ariosa* contains a Cross-Liabilities Collision & Tower's Liability Clause with Sistership Provision. The clause is set forth in full in the petition at pages 4 to 5. Generally, it provides that if the insured vessel (the *Ariosa*) shall cause her tow (the *D 22*) to come into collision with another vessel (the *Segundo*) and the assured as owner of the insured vessel shall become liable to pay any sums not exceeding in respect of any one casualty the value of the vessel insured, the Underwriters shall pay the assured such proportion of such sums as their subscriptions to the policy bear to the value of the vessel insured. (In the present instance the *Ariosa* was valued in the policy at the full amount of the insurance, viz., $45,000.)

The clause in question thereafter provides that "when both vessels are to blame * * * claims under the collision clause shall be settled on the principle of Cross Liabilities, as if the owners of each vessel had been compelled to pay

to the owners of the other such vessels, such one-half * * * of such latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured" (R. 40-41); and also, "that the principles involved in this clause shall apply to the case where two or more of the vessels involved are the property in part or in whole of the same owners" (R. 41). Thus the petitioners agreed to indemnify Du Bois in the event of a both to blame collision to the extent that Du Bois would be liable for the damages involved if all of the vessels were separately owned; in which event Du Bois as owner of the *Ariosa* would be liable to pay one-half the damages of the *Segundo* and one-half the damages of the scow *D 22* (R. 40).

After the entry of the final decree in the collision case a claim was stated by respondent, Du Bois, against the plaintiff-underwriters on the tug *Ariosa* pursuant to the provisions of this clause as follows (R. 5, at f. 15—R. 6, at f. 17):

To satisfy the liability of the defendant Henry Du Bois Sons Company for ½ of the *Segundo's* damages:		
½ *Segundo's* damages	$10,305.58	
Interest to date of entry of decree	1,755.62	
Costs	811.04	$12,872.24
The balance due on the damages to the dump scow *D 22*:		
½ of scow *D 22's* damages, not recovered against *Segundo*	9,262.00	
Interest to date of entry of decree	1,487.57	10,749.57
		$23,621.81

The plaintiffs first paid the balance of damage due the owners of the *Segundo* pursuant to the final decree, and thereafter paid the balance of the claim, after taking credit for the amount advanced by the respondent, Hartford, on account of the damage to the scow *D 22* with interest thereon. This payment was made and accepted without prejudice to the rights of the parties as they existed at the entry of the final decree in the collision case (R. 6, at f. 17—R. 7, at f. 21).

The plaintiffs thereupon brought the within action for a declaratory judgment, "that plaintiffs' liability under their aforesaid policy has been fully satisfied and discharged" (R. 9).

The defendants' answer admits the allegations of the complaint (R. 17). Motions were thereupon made by both the plaintiffs and the defendants for judgment on the pleadings (R. 18-19).

The Issue.

The only issue thus presented was whether or not plaintiffs were entitled in settling the claim of their assured under the Collision & Tower's Liability Clause of their policy to take credit for the amount of an insurance coverage on the scow in the absence of any provision in their policy giving them the benefit of such insurance.

The District Court, in a careful opinion, decided against the plaintiffs and granted judgment in favor of the defendant, Henry Du Bois Sons Company (R. 20-27). The opinion is reported at 53 F. Supp. 516.

The Circuit Court of Appeals in stating the issue and passing upon the petitioners' contentions with respect thereto said (R. 39-40):

> "We think the judgment below was right. It should be noted that there was no clause in the policy which the plaintiffs issued giving them the benefit of,

or any interest in, any insurance which might cover any vessel damaged through the fault of the 'Ariosa'. Not having any contractual right to any such benefit they can now have none except by operation of law. Their policy and that on the scow did not cover the same liability, and though policies are sometimes written which cover loss only to the extent of the excess over any other insurance coverage, see *Marine Transit Corporation* v. *Northwestern Fire & Marine Insurance Co.*, 2 Cir., 67 F. (2) 544, this contract was not of that kind and must, of course, be given effect as written. Moreover, this is not even an instance where an insured has already been reimbursed from other insurance partially or wholly for a loss. The Hartford policy has not been paid except upon the condition set forth in the loan receipt. Such a receipt is a lawful contract which will be enforced. *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139. It is not an unconditional payment of the insurance.

The contention of the plaintiffs accordingly boils down to this. Because there happened to be hull insurance on a vessel not at fault which was injured through the fault of the 'Ariosa' for which they are liable under their policy, their liability is reduced by the amount of that other insurance on the ground that they can compel its collection for their benefit. As their contract with the insured failed so to limit liability they would have the court imply such limitation as a matter of law. Of course where there is double or concurrent insurance the assured may recover no more than his full loss, which is ultimately borne by the underwriters proportionately to their respective commitments. *Home Insurance Co.* v. *Baltimore Warehouse Company*, 93 U. S. 527. But here there is no double insurance and there can be no double recovery at all."

ARGUMENT.

I.

The decision below is entirely consonant with the decision in *Marine Insurance Co.* v. *McLanahan*, in the Fourth Circuit (5 F. (2d) 773).

The petitioners' argument that there is a conflict between the decision below and the decision in the Fourth Circuit in the case of *Marine Insurance Co.* v. *McLanahan* (referred to by petitioners as the Augusta-Detroit decision) proceeds upon a purely gratuitous and faulty analysis of the decision of the Circuit Court of Appeals in the Fourth Circuit in the *McLanahan* case, as is clearly pointed out in the decision below (R. 42-43). The Circuit Court of Appeals after carefully analyzing the *McLanahan* decision said (R. 43):

> "So far as that decision involved issues here presented, it was held that the insurer of a towing vessel at fault for collision damages to a vessel under common ownership could not, in the absence of policy provisions to that effect, diminish its liability under collision and sistership clauses for that loss by the amount of hull insurance paid on the policy on the vessel damaged. They were not required to pay the entire loss and the amount of the Detroit policy in addition and thus give the assured the windfall of double insurance, but they were not permitted to reduce their liability under the August policy simply because there was separate insurance on the barge lost. What was denied them is therefore in effect what was denied these plaintiffs when the trial judge denied their motion for judgment and granted that of the defendants."

The petitioners in their argument to this Court, as in their argument both before the District Court and the

Circuit Court of Appeals, attempt to make it appear that there is involved in the instant case a claim of the respondent, Hartford Fire Insurance Company, to be subrogated to rights against its own assured. No such argument has been advanced and no such principle is established by the decisions below. On the contrary, as appears from a reading of the decision of the District Court and the decision of the Circuit Court of Appeals, it is the petitioners who seek to claim the benefit of insurance which their assured had upon the scow in an effort to override their own obligation to their assured.

It has been conceded throughout this litigation that: "Had the scow not been insured at all it is clear and undisputed that the plaintiffs would have been bound under the policy on the *Ariosa* not only to pay to the *Segundo* one-half its damages but to pay one-half the scow's damages also" (R. 37). This is all that the petitioners have been compelled to do. The other one-half of the scow's damages were in effect paid by the owners of the *Segundo* by being credited to Du Bois against Du Bois' liability to the owners of the *Segundo* (R. 15-16).

It was unquestionably competent for Du Bois and Hartford to enter into an agreement between themselves whereby Hartford advanced a sum equivalent to the amount of its insurance on the scow, pending the outcome of the litigation which had been instituted by Du Bois against the *Segundo* and pending the outcome of the prosecution of any insurance claim which Du Bois might have against the Underwriters on the *Ariosa* following the outcome of the principal litigation. *Luckenbach* v. *W. J. McCahan Sugar Refining Co.*, 248 U. S. 139; *Peninsular* v. *Atlantic Mut. Ins. Co.* (E. D. Pa.), 185 Fed. 172, 177; *The Turret Crown* (C. C. A. 2), 297 Fed. 766, 778-9; *Sorenson* v. *Boston Ins. Co.* (C. C. A. 4), 20 F. (2d) 640, cert. den. 275 U. S. 555; *Automobile Ins. Co.* v. *Springfield Dyeing Co., Inc.* (C. C. A. 3), 109 F. (2d) 533.

The decision of the Circuit Court of Appeals for the Second Circuit in *China Fire Ins. Co.* v. *Davis*, 50 F. (2d) 389, cert. den., 284 U. S. 658 (Petitioners' Brief, pp. 14-15), is not to the contrary and does not make the distinction between absolute and conditional liability on the part of the underwriter, as urged by petitioners.

In that case a shipper had procured insurance on his goods which contained no clause exempting the underwriter *pro tanto* to the extent the shipper should recover against the carrier. The carrier's bill of lading contained a provision giving it the benefit of insurance. A loss having occurred, the shipper recovered from the carrier under an agreement whereby the shipper undertook to collect its insurance for the carrier's benefit. This was done, and the money collected from the insurance company eventually was paid over to the carrier. The insurance company paid under a loan receipt and requested the shipper to institute action against the carrier. After some lapse of time the insurance company, discovering what had been done, brought an action against the carrier to recover the money which it had paid under the policy, claiming that a fraud had been practiced on it. The insurance company was allowed a recovery.

The Circuit Court of Appeals in that case held that if the provision in the bill of lading giving the carrier the benefit of insurance should be valid the underwriter could have no recovery; for, if the insurance had validly been taken out for the benefit of the carrier, the underwriter would eventually be liable to the carrier for the loss and, such being the case, it would be immaterial whether the payment of the loss by the insurer had been effectuated through subterfuge or fraud; but contrariwise (p. 391):

> "If, however, the clause was invalid as an unlawful discrimination, the plaintiff may succeed upon the common count for money had. In that case the

> shipper procured by fraud what the plaintiff was not obliged to pay, because it was in that case only surety for the loss, and the principal had already paid. Moreover, it paid only on the understanding that it should have the benefit of the carrier's liability, and that too by the same form of receipt as was used in *Luckenbach* v. *W. J. McCahan Sugar Co., supra,* though any other equivalent expression would have served."

Thus in the instant case, there being no provision in the petitioners' policy giving the petitioners the benefit of other insurance on the scow, and the petitioners having, by the terms of their policy, undertaken to indemnify Du Bois for the damage to the scow as if it were the property of a third person and Du Bois were liable for such damage; it was entirely competent for Hartford and Du Bois respectively to make and accept a conditional payment of the Hartford insurance under the form of a loan receipt.

II.

There is no conflict between the decision below and the decision of this Court in *Home Insurance Co.* v. *Baltimore Warehouse Co.*, 93 U. S. 527.

The argument advanced by petitioners under their second point is that the insurance on the scow and the insurance on the tug were double insurance. It should be noted in passing that there is no reference to this contention in the decision of the District Court; the reason for which is that the contention was first advanced in the Circuit Court of Appeals. The principle of contribution between Underwriters applied by this Court in the case of *Home Insurance Co.* v. *Baltimore Warehouse Co.,* and by the Circuit Court of Appeals in the Eighth Circuit in the case of

Dixey v. *Federal Compress & Warehouse Company*, 140 F. (2d) 820 (Petitioners' Brief, pp. 15-16), applies only where there is double insurance.

Double insurance is defined in I *Arnould on Marine Insurance* (12th Ed.), Section 330, page 469, thus:

> "Double insurance takes place when the assured makes two or more insurances on the same subject, the same risk and the same interest."

As is indicated by the decisions in *Home Insurance Co.* v. *Baltimore Warehouse Co.* and *Dixey* v. *Federal Warehouse Co.*, the insurance policies which were held to be double insurance, covered the same property against the same risks and were for the same interest.

In the case of *Home Insurance Co.* v. *Baltimore Warehouse Co.*, one of the policies had been taken out by the bailor and one by the warehouseman. The policies covered the same risks and both were for the benefit of the owners of the goods. Thus it was that this Court said in that case:

> "It follows, necessarily, that there was double insurance. The policy issued to the Warehouse Company, and those obtained by the depositors of the merchandise, covered the same property, and they were for the benefit of the same owners."

The same situation maintained in *Dixey* v. *Federal Compress & Warehouse Co.*

In neither case was there any issue as to the fault or the negligence of the warehouseman; and in both cases the policy taken out by the warehouseman covered the property in the goods, and did not cover the warehouseman's liability.

Thus as pointed out by the Circuit Court of Appeals in *Dixey* v. *Federal Compress & Warehouse Company, supra*, in answer to the contention made by the plaintiff that the warehouseman's insurance was primary insurance (p. 822):

> "No negligence in respect to the fire was charged against the warehouse company * * *.
>
> * * * They (the policies) each, in specific terms, insured against damage by fire to the specific property to the amount of the value. Although the Pennsylvania promised to pay to the plaintiffs and the Pacific promised to pay to the warehouse company, the warehouse company was required by the regulation to pass the money promptly on to the plaintiffs so that the plaintiffs' interest was the sole and real interest insured." (Matter in parentheses supplied.)

In the instant case the Hartford policy insured Du Bois against damage by marine perils to the scow *D 22* in an amount of $10,000; the plaintiffs' policy, by the provisions thereof pertinent to this controversy, insured the legal liability of Du Bois as owner of the tug *Ariosa*, for damages sustained by others in consequence of the fault of the *Ariosa*. That the said policy by its terms was extended to cover Du Bois for damages to other vessels owned by Du Bois caused by the fault of the insured vessel as if such other vessels were differently owned, cannot change the character of the insurance from one covering liability to one covering property.

The plaintiffs did not directly insure the scow *D 22* nor did they indirectly insure the said scow against marine perils. Their insurance was conditioned upon fault on the part of the insured vessel, namely, the *Ariosa*. Since the *Ariosa* has been found to be at fault, as between Hartford Fire Insurance Co. and the plaintiffs, the plaintiffs' insurance would be primary insurance and therefore liable to respond in the first instance to the extent of the coverage, which is ample. The two insurances, therefore, are not double insurance. *Sorenson* v. *Boston Ins. Co.*, 20 F. (2d) 640, cert. den. 275 U. S. 555.

The petitioners cite the Arbitrator's decision in the *Industry-Commerce* arbitration, unofficially reported at 1939 A. M. C. 717. While the Arbitrator directed appor-

tionment he recognized in doing so that he had no legal authority therefor, saying (p. 719):

> "While a case like the present does not fall within the definitions of double insurance as given in the decisions and textbooks, it seems to me to involve the same principle."

The case of *Davis Yarn Co.* v. *Brooklyn Yarn Co.*, 293 N. Y. 236, cited by petitioners, turned upon the question as to whether of several insurances all covering the same property against the same risks and for the benefit of the same owners, certain of the policies were specific insurance and others floating insurance. All of the policies were floating policies in form, but in some the addresses where the properties were to be stored were specified. The decision is merely to the effect that such specification of addresses, alone and by itself, is not sufficient to take the policies out of the category of floating insurance, and that therefore all of the insurances covering the same properties against the same risks and for the benefit of the same owners were concurrent insurance and must contribute.

Thus, as said by the Circuit Court of Appeals in the opinion below (R. 40):

> "But here there is no double insurance and there can be no double recovery at all.
>
> The important issue is whether under the so-called sistership clause hull insurance on the vessel damaged through the fault of the sister ship does in the absence of any agreement to that effect inure to the benefit of the insurer of the legal liability of the owner of the ship at fault. The risk those insurers assumed under their policy was the risk upon which the premium they received was based and there is no inequity in requiring them to perform that which they undertook and for which they were paid. If they do the result will in effect be that the *D 22*, which was not in any wise at fault, will recover her

full damages, one-half from the *Segundo* and one-half from the *Ariosa*. The *Segundo* will be paid one-half her damages by the *Ariosa*. The underwriters of the *Ariosa*, the plaintiffs, will reimburse the *Ariosa* for the one-half of the *Segundo's* damages paid and will pay the one-half of the damages sustained by the *D 22* which were not, in effect, paid by the *Segundo*."

Conclusion.

The respondents submit, therefore, that there is not any meritorious foundation upon which this Honorable Court should be called upon to review the considered opinion of the Circuit Court of Appeals for the Second Circuit in this case.

WHEREFORE, respondents pray that the petition be denied.

Respectfully submitted,

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